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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 175

TALMADGE RALEY, JOSEPH STERN, EMMETT CALVIN BROWN,

Appellants,

v.

STATE OF OHIO,

Appellee.

APPEAL FROM THE SUPREME COURT OF OHIO

BRIEF FOR APPELLANTS

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BRIEF FOR APPELLANTS

Opinions Below

The opinion of the Supreme Court of Ohio delivered upon the rendering of the judgment sought to be reviewed is officially reported in 167 Ohio State 295, together with a dissenting opinion (R. 251).

The opinion of the Supreme Court of Ohio delivered upon the rendering of the judgment which the previous appeal of this cause sought to have reviewed is officially reported in 164 O. S. 529, together with three dissenting opinions (R. 201-241).

The opinion of the Court of Appeals for the First District of Ohio in this cause is officially reported in 100 Ohio Appellate 75 (R. 173-196).

Jurisdiction

The judgment and order of the Supreme Court of Ohio from which this appeal was taken was entered on February 11, 1958. Appellants' Application for Rehearing was denied on March 5, 1958. Notice of Appeal was filed in the Supreme Court of Ohio on May 29, 1958. Appellants' Statement as to Jurisdiction was filed in this Court on July 16, 1958. This Court postponed jurisdiction October 20, 1958.

The jurisdiction of this Court is invoked under 28 U. S. C. 1257 (2).

Constitutional Provisions and Statutes Involved

The First Amendment to the United States Constitution provides:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

The Fifth Amendment to the United States Constitution provides in part:

> "No person . . . shall be compelled in any criminal case to be a witness against himself. . . ."

The Fourteenth Amendment to the United States Constitution provides in part:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privilege or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Article I Section 10 to the Constitution of Ohio provides in part:

". . . No person shall be compelled, in any criminal case to be a witness against himself; . . ."

Ohio Revised Code Section 103.31-103.38 provides:

"Section 103.31 UN-AMERICAN ACTIVITIES COMMISSION.

There is hereby created an un-American activities commission in the legislative branch of the government, consisting of six members of the senate and six members of the house of representatives, respectively. The president pro tempore of the senate and the speaker of the house of representatives shall be members and shall appoint as members of the commission five additional members in each house, not more than three of whom shall be members of the same political party. When a vacancy of the membership of the commission occurs it shall be filled in the same manner as the original appointments.

Section 103.32 ORGANIZATION.

The un-American activities commission shall organize by selecting from its membership a chairman, a vice-

chairman, and a secretary. The members of the commission shall serve without compensation but shall be reimbursed for their actual and necessary expenses incurred in the discharge of their official duties.

Section 103.33 LEGAL DIRECTOR AND ASSISTANTS.

The un-American activities commission shall employ and fix the compensation of a legal director who shall employ, with the approval of the commission, such assistants, stenographers, and clerks, and engage the services of such professional investigators or technical advisors as the commission deems necessary to carry out the objects and purposes of section 103.34 of the Revised Code.

The salaries and all expenses incurred by the commission shall be paid from the state treasury upon the warrant of the auditor of state by voucher approved by its chairman.

Section 103.34 . POWERS AND DUTIES.

The un-American activities commission shall:

(A) Investigate, study, and analyze:

(1) All facts relating to the activities of persons, groups, and organizations whose membership includes persons who have as their objective or may be suspected of having as their objective the overthrow or reform of our constitutional governments by fraud, force, violence, or other unlawful means;

(2) All facts concerning persons, groups, and organizations, known to be or suspected of being dominated by or giving allegiance to a foreign power or whose activities might adversely affect the contribution of this state to the national defense, the safety and security of this state, the functioning of any agency of the state or national government, or the industrial potential of this state;

(3) The operation and effect of the laws of this state, of the several other states, and of the United States, which purport to outlaw and control the activities enumerated in this section and to recommend such additional legislation or revision of existing laws as may seem advisable and necessary;

(B) Maintain a liaison with any agency of the federal, state, or local governments in devising and promoting means of disclosing those persons and groups who seek to alter or destroy the government of this state or of the United States by force, violence, intimidation, sabotage, or threats of the same.

The commission has such additional rights, duties, and powers as are necessary to enable it fully to exercise those specifically set forth in this section and to accomplish its lawful objectives and purposes.

Section 103.35 POWERS OF CHAIRMAN AS TO WITNESSES.

In the discharge of any duties imposed by sections 103.31 to 103.38, inclusive, of the Revised Code, the chairman of the un-American activities commission may, throughout the state, administer oaths, issue subpoenas compelling the attendance of witnesses and the production of any papers, books, accounts, records, documents, and testimony, and cause the deposition of witnesses either residing within or without the state. In case of disobedience on the part of any person to comply with a subpoena issued on behalf of the commission or on the refusal of any person or officer to testify to any matters regarding which he may be lawfully interrogated, or to conform to section 2705.02 of the Revised Code, the chairman may be authorized by a majority of the members sitting at the time the alleged offense is committed, to cause a proceeding for

contempt to be filed and prosecuted in the court of common pleas of any county under sections 2705.03 to 2705.09, inclusive, of the Revised Code. Each witness appearing before the commission by its order, other than a state official or employee, shall receive such compensation as the commission directs and mileage in the amounts provided by section 2335.08 of the Revised Code. Fees shall be authorized and paid after a notation has been made on the proper voucher sworn to by such witness and approved by the chairman of the commission.

Section 103.36 STUDIES MAY BE REQUIRED TO BE SUBMITTED.

Each officer, board, commission, or department of the state government or of any local government shall make such studies as the un-American activities commission requires within the limitations of its budget and shall furnish the commission all such assistance, information, records, and documents as it requires for the accomplishment of its duties. Reports and recommendations resulting from such studies shall be presented to the commission at least within sixty days prior to the regular session of the 100th General Assembly.

The commission may require the services of the bureau of code revision, judicial council, legislative reference bureau, legislative research commission, the Ohio program commission, and such other departments and agencies as it deems necessary to prepare a program of legislation as provided by section 103.34 of the Revised Code.

Section 103.37 MEETINGS; SUBCOMMITTEES.

The un-American activities commission shall meet as often as is necessary to perform its duties, provided that in any event it shall meet at least once each quarter. Five

members constitute a quorum, and the majority thereof have authority to act on matters within the jurisdiction of the commission. The commission shall formulate such rules of procedure and policies to be followed in the performance of its duties and functions as it deems necessary and appropriate. The chairman may appoint subcommittees, consisting of not less than three members of the commission, which shall have all the powers conferred upon the commission itself by sections 103.31 to 103.38, inclusive, of the Revised Code, and such specific duties as are assigned to them. A majority of each subcommittee constitutes a quorum. The chairman of any subcommittee has all of the powers conferred upon the chairman of the commission by sections 103.31 to 103.38, inclusive, of the Revised Code.

Section 103.38 REPORTS.

The un-American activities commission shall keep minutes of each meeting or hearing and a record of all testimony and evidence submitted to it. It may make such reports, findings, and recommendations, based upon its investigations and studies, as it deems advisable and necessary, to the people, the members of the One Hundredth General Assembly, individually, or in any special session thereof, and to the governor. It shall complete its work by and render a final report of its activities and of its recommendations to the One Hundredth General Assembly, the governor, and the attorney general on January 31, 1954, at which time all of its records, books, documents, and other property shall be committed to the attorney general. Any member of the general assembly, the governor or the attorney general shall have the right to attend any session of the commission, and may present his views on matters which the commission may be considering."

Ohio Revised Code Section 101.44 provides:

"Except a person who, in writing, requests permission to appear before a committee or subcommittee of the general assembly, or of either house thereof, or who, in writing, waives the rights, privileges, and immunities granted by this section, the testimony of a witness examined before a committee or subcommittee shall not be used as evidence in a criminal proceeding against such witness, nor shall a person be prosecuted or subjected to a penalty or forfeiture on account of a transaction, matter, or thing, concerning which he testifies, or produces evidence. This section does not exempt a witness from the penalties for perjury."

Ohio Revised Code Section 2705.02 provides in part:

"ACTS IN CONTEMPT OF COURT.

A person guilty of any of the following acts may be punished as for a contempt:

• • •

(C) A failure to obey a subpoena duly served, or a refusal to be sworn or to answer as a witness, when lawfully required; . . ."

• • •

Questions Presented

Whether Sections 103.31-103.38 of the Revised Code of Ohio establishing and defining the powers and duties of the Ohio un-American activities commission, as applied to these appellants, are in violation of the Due Process Clause of Section I of the Fourteenth Amendment to the Constitution of the United States for the reason that:

(1) The delegation of authority to the legislative commission was so sweeping, indiscriminate and vague that the constitutionally required preliminary control of the commission by the Legislature was non-existent;

(2) There was no clear determination by the Ohio Legislature that the authorized inquiry into the area of the freedoms protected by this Amendment was justified by a specific legislative need;

(3) Appellants as witnesses before the commission were not able to determine from the statutory delegation of authority of the commission, or from any other indicia of the legislative matters under inquiry, whether the questions propounded to them were pertinent to the matter which the Ohio Legislature intended to have investigated;

(4) Appellants as witnesses were not directed by said commission to answer questions which formed the counts in the indictments for contempt following appellants' assertion of the privilege against self-incrimination;

(5) They authorize and direct a legislative commission to exercise the non-legislative power of exposing individuals for the sake of exposure;

(6) They legislate and authorize legislative investigation in the area of sedition in which area United States Congressional action has preempted and superseded the power of the state;

(7) Although appellants were specifically and repeatedly advised by said commission that they were protected by their constitutional privilege against self-incrimination the Supreme Court of Ohio subsequently held that appellants were in contempt of that commission for asserting their privilege in refusing to answer certain questions because the State Immunity Statute, Ohio Revised Code Section 101.44 removed the need for such privilege;

(8) The State Immunity Statute, Ohio Revised Code Section 101.44, does not and could not grant immunity from prosecution by the United States or other states, particularly in view of the fact that the un-American activities commission of Ohio was authorized and directed by Section 103.34 (B) to make disclosures about matters which

could become the basis for prosecution under Federal and State laws to any agency of the Federal, State or local governments.

Statement of Case

Appellants have been sentenced to fines and imprisonment under indictments charging violations of Ohio General Code Section 12137 (now Ohio Revised Code Section 2705.02) for refusing to testify as to certain specified questions before the Ohio un-American activities commission.

1. Hearings

Raley, Brown and Stern, the appellants herein, were individually summoned to appear and to testify under oath before the un-American activities commission of Ohio (hereinafter called Commission) at a session held in Cincinnati, Ohio, on October 20, 1952. The statute creating the Commission (Ohio Revised Code Sections 103.31-103.38) gave it sweeping powers to investigate "All facts" concerning vaguely defined subversive and seditious activities of persons, groups and organizations. The Commission's vast authority included power to investigate:

> "All facts concerning persons, groups and organizations . . . whose activities might adversely affect . . . the functioning of any agency of the state or national government or the industrial potential of this state . . ."

In addition, the Commission was directed to:

> "Maintain a liaison with any agency of the federal, state or local governments in devising and promoting means of disclosing those persons and groups who seek to alter or destroy the government of this state or of the United States by force, violence, intimidation, sabotage, or threats of the same."

There is nothing in the Record to indicate that the Ohio Legislature in any way defined or limited this indiscriminate mandate or that it made a clear determination that a specific legislative need justified placing constitutional liberties in jeopardy.

The chairman opened the session with a statement which among other things accused the witnesses, including appellants, of practicing "fraud and deception" (R. 76). In no way did the chairman in this statement clarify the purpose of the session nor the matter under inquiry, except possibly by suggesting that the witnesses, including appellants, feared "exposure of un-American activities conducted in secret . . ." (R. 76). Even when the appellants inquired as to the purpose or pertinence or challenged the right to inquire, the Commission offered no guidance. Thus, on two occasions the Commission conceded that the information sought was already of record but that it was "within the scope of our investigation" (R. 78, 80-81). On another occasion the question was simply repeated (R. 108). At one point after appellant Raley complained that the Commission was not within its bounds in prying into his thoughts, the Commission replied:

> ". . . We simply want to know whether your intentions as a responsible labor leader in Cincinnati constitutes a menace to the war effort in this area . . ." (R. 116).

When appellant Stern challenged the right of the Commisson to pry into his opinions and thoughts, the Commission finally asserted that it depended on the "nature" of his opinions (R. 146-147). And when appellant Brown said he did not think the question was properly the business of the Commission, the reply was:

> "We will determine that, Mr. Brown" (R. 150-151).

The questioning of appellants, which for the most part was insulting, hostile and incriminating, ranged over a wide area of their lives, associations and opinions (R. 77-165), and a great majority of the questions were of the "Is it not a fact" cross-examination variety (R. 86-103; 136-148; 151-163). Accusations of criminal activities were implied in questions (R. 143, 153), "Have you stopped beating your wife?" questions were used (R. 135-136), and on one occasion an intent to decoy the witness into a perjury indictment was demonstrated (R. 155).

The Record shows that only a very few of the questions asked the appellants sought answers to which the Commission did not assume it had the answer. The nature of the hearings is fully revealed by noting the kind of questions which were asked to which the answers were not assumed. (Colloquies as to the meaning of phrases, the use of prepared statements, etc. are not included in this analysis.) As to appellant Raley, he was asked about the purposes of the Soviet Union (R. 107), the affect on the Bill of Rights if the Communist Party won (R. 107), a Saturday Evening Post article (R. 107-108), whether he advocated the overthrow of the United States government by force (R. 109), whether he would defend the United States against Russia (R. 109), the difference between World War II and the Korean War (R. 115-116), how he would hasten the war effort (R. 115), whether people would be happier if he promised to increase war production (R. 116-117), and his opinion of working conditions in Russia, the United States, England and France (R. 117-118). The Commission did not ask appellant Raley one other question to which it did not indicate that it already had the assumed answer. As to appellant Stern, he was asked questions as to whether several oaths of allegiance he had taken were not inconsistent with his Communist Party membership (R. 135-136), whether his connection with the Progressive Party

or the Commission's statement that he was connected with the Progressive Party was a smear against said party (R. 139), and whether he attended the Lenin School in Moscow (R. 148). To each other question which the Commission asked appellant Stern, the Commission indicated it already had the assumed answer. As to appellant Brown, the Commission questioned him about his educational background (R. 150), and his participation in the 1947 Cincinnati municipal election (R. 164). To each other question which the Commission asked appellant Brown, the Commission indicated it already had the assumed answer. In summary, the hearings indicate that the Commission's primary, if not sole, purpose was to disclose and expose the witnesses as possible subversives, which purpose was included in the Commission's spacious mandate. (Ohio R. C. Sec. 103.34 (B)).

To a great majority of the questions the appellants invoked their privilege against self-incrimination under the Constitution of the United States or the Constitution of the State of Ohio or both. The chairman of the Commission frequently informed the appellants that such privilege was available (R. 99, 134, 157), and on the trial of this case testified that it was the policy of the Commission not to press for answers to incriminating questions (R 40). At no time was the possible applicability of the Ohio Immunity Statute (R. C. 101.44), on which the Supreme Court of Ohio based its affirmance of the ultimate convictions of these appellants, mentioned. Appellants' assertion of the privilege was in all but a very few instances automatically accepted by the Commission (R. 77-165).

Frequently the appellants were asked questions concerning speeches they had made, discussions they had led, and political activity they had engaged in (R. 88, 92-93, 96, 97-100, 107, 108-109, 111-112, 117, 136, 139, 145-146, 156, 160). Appellant Brown was even queried as to his support of

candidates and issues in the Cincinnati municipal election of 1947 (R. 163-164).

2. Proceedings

More than six months later the appellants were separately indicted by the Grand Jury of Hamilton County, Ohio, for refusing to testify as to certain specified questions asked them in that proceeding in violation of Ohio Revised Code Section 2705.02 (formerly O. G. C. 12137).[1] To each of these specified questions each appellant had asserted the privilege against self-incrimination guaranteed by the Ohio and federal constitutions, or language indicating such privilege. In only one instance did the Commission specifically order and direct an answer after the privilege had been asserted (R. 132) and in only several other instances did the Commission question the applicability of the privilege (R. 85, 91, 99, 106). In all other instances the assertion was automatically accepted. And in no instance were the appellants confronted with the clear-cut choice of answering or being held in contempt. Although appellant Raley had asserted the privilege to over 100 questions, he was indicted as to only 16. Appellant Stern had asserted the privilege to over 70 questions and was indicted on only 2. Appellant Brown had asserted the privilege to over 70 questions and was indicted as to only 4. There is no apparent basis for determining why the specified questions were chosen. For example, appellant Raley was indicted for asserting the privilege to eight "Do you know (named individual)?" questions, although he had asserted the privilege to many other like questions (R. 89, 90, 98), and appellants Brown and Stern had also done the same (R. 140-141, 162-163).

[1] The questions forming the separate counts in the indictments are set out in Appendix "A" with appropriate references to the Record.

Since the cases, although differing as to the wording of each question, involved the same questions of law, by agreement they were tried together before the Court of Common Pleas, Hamilton County, Ohio. Motions to quash, pleas in abatement and demurrers to the indictments were overruled. A jury trial was waived. The chairman, one member, the counsel, and the reporter of the Commission testified as to the procedure of the Commission and the records of the Cincinnati Hearings before which the appellants had been subpoenaed. The cross-examination attempted to determine the purpose of the Cincinnati Hearings. The only answers given were these:

> "... to investigate un-American activities ... (R. 36)
>
> "... to learn what, if anything, they (the appellants) knew about communist activities in the Cincinnati area" (R. 37).
>
> "... (appellants) ... were in position to furnish information ... to the General Assembly which might be used in the intelligent consideration of laws to be considered or passed by the Ohio General Assembly" (R. 55).
>
> "... (appellants) ... were in a position to furnish information concerning the communist party in the State of Ohio" (R. 55-56).

In most instances objections by the State to questions as to the purpose of calling the appellants and as to the information the Commission already had about the appellants was sustained (R. 35, 36, 37, 57, 60-65).

In addition, the cross-examination of the chairman of the Commission brought out that it was the policy of the Commission not to press for answers to questions considered incriminating since, as to such questions, the witnesses had the right to refuse answers (R. 40).

After oral argument in which the appellants urged all their constitutional rights, the Trial Court found each appellant guilty of contempt as charged under each count in the indictments. Each appellant was sentenced to ten days in jail under each count, the sentences to run concurrently, and each was find $500 and costs under each count, the fines as to all but the first count in each indictment being remitted. A motion for a new trial was overruled. Sentences were stayed pending appeals.

On appeal, where the cases were consolidated, the Court of Appeals for the First Judicial District of Ohio, after oral arguments and briefs, in which appellants urged all their constitutional rights, affirmed the convictions on all counts involving questions asked by a Commission member and reversed on all counts involving questions asked only by counsel of the Commission (R. 173-196).

On appeal, after oral arguments and briefs in which appellants urged all their constitutional rights, in a 4-3 decision the Supreme Court of Ohio affirmed the judgments of conviction (R. 201-241). The majority based its decision, which it also was rendering in the companion case of *State of Ohio* v. *Morgan*, on the applicability of the Ohio Immunity Statute (R. C. Section 101.44), conceding that the chairman of the Commission, when he stated that the privilege was available and thus the Immunity Statute not applicable, "obviously misstated the law" (R. 222). The dissent by Judge Hart was based on the applicability of the Fifth Amendment to the United States Constitution to the Commission hearings (R. 230-235). A second dissent by Judge Stewart stated:

> "It seems to me that, since the defendants were apprised by the commission at the time they were testifying they had a right to refuse to answer questions which might incriminate them, they could not possibly

in following the admonition of the commission be in contempt of it except possibly as to the questions which the defendants were directed to answer" (R. 237).

A third dissent by Judge Taft was based on statutory construction not in issue before this Court.

An appeal was docketed in this Court on August 10, 1956. On June 27, 1957 this Court vacated the judgments of the Supreme Court of Ohio and remanded the case for reconsideration in the light of *Sweezy* v. *New Hampshire*, 354 U. S. 234 and *Watkins* v. *United States*, 354 U. S. 178 (R. 248).

On reconsideration, after oral argument and briefs, the Supreme Court of Ohio adhered to its former judgments. The decision was a brief Per Curiam opinion (R. 251) in which four of the judges joined, one dissented, and the remaining two who sat did not indicate either a concurrence or dissent. The application for rehearing was denied.

Summary of Argument

I.

It is clear that state legislative investigations are capable of infringing the constitutional liberties of individuals. *Sweezy* v. *New Hampshire*, 354 U. S. 234; *N. A. A. C. P.* v. *Alabama*, 357 U. S. 449. These two cases along with *Watkins* v. *United States*, 354 U. S. 178 and *Quinn* v. *United States*, 349 U. S. 155, have defined the constitutional standards which legislative investigations must meet in order to safeguard the freedom of witnesses compelled to testify. In this case all of these standards were violated.

The authorizing resolution conferred unlimited discretion upon the Ohio un-American activities commission. Its potential sweep was all-inclusive since it authorized an investigation of "All facts concerning persons . . . whose activities might adversely affect . . . the functioning of

any agency of the state or national government. . . ." Such broad and ill-defined jurisdiction nullified the authority of the Commission and deprived appellants of their constitutional rights under the Due Process Clause. *Sweezy*, supra; *Watkins*, supra.

The Commission clearly invaded appellants First Amendment freedoms of speech and association. It demanded from appellants information about their political affiliations and activities, associations, public protests and statements, thoughts and opinions. For example, one appellant now stands convicted of contempt for refusing to tell whether he was active in the support of any candidate or issue on the 1947 Cincinnati election ballot. These unwarranted intrusions were never justified as being connected with some fundamental interest of the state. Precious constitutional liberties cannot be impinged without such justification. *Sweezy*, supra; *N. A. A. C. P.*, supra; *Watkins*, supra.

Appellants never had any clear notion of why their testimony was required nor of the purpose of the hearings at which they testified. The unlimited mandate was not a guide. Clarification was neither volunteered by the Commission nor given in response to appellants' questions. It was then impossible for these appellants and any counsel they might have had and is now impossible for any court to determine whether the questions asked appellants were pertinent to the legislative inquiry.

Appellants were informed by the Commission that their state and federal constitutional privilege against self-incrimination was available. Their frequent assertions of it were in all but an occassional instance accepted. They invoked it as to all questions for which they now stand convicted for refusing to answer. Their invocations at such times were in most instances accepted by the Commission without comment. In several instances the Commission only

asked how the question was incriminating. In only one instance was a direct order to answer given. In no instance were appellants ever specifically confronted with the clear-cut choice of answering or being charged with contempt.

Appellants could not determine pertinence, were subjected to a needling inquisition, and never were informed that the Commission considered their refusals to answer the questions which form the counts in their indictments contemptuous. Due process prohibits their convictions. *Sweezy*, supra; *Watkins*, supra; and *Quinn*, supra.

The mandate to the Commission directed it to promote "means of disclosing those persons . . ." and the hearings demonstrated that the Commission's evident purpose was to stigmatize appellants by exposing them to the glare of unfavorable publicity. Over ninety percent of the questions asked were of the leading, cross-examining, "Is it not a fact" type. Past arrests were highlighted and accusations of prior "false and fraudulent" actions leveled. The Commission in no way evidenced any purpose to discover facts which might be used for lawful legislative ends. The appellants were subjected to brutal inquisition not legitimate interrogation. This infringed due process. *Sweezy*, supra; *Watkins*, supra.

II.

The un-American activities commission of Ohio was obviously engaged in ferreting out what it considered, under a far-reaching mandate, to be subversive or seditious. Congress had by federal legislation preempted this field and thereby precluded state legislation therein. These appellants were compelled to testify almost exclusively as to their alleged "subversive" or "Communist Party" activities and associations. If a state cannot constitutionally legislate in this field, it cannot constitutionally compel testimony concerning it. The Commission had no lawful legislative

purpose. *Pennsylvania* v. *Nelson*, 350 U. S. 497; *Sweezy*, supra; *N. A. A. C. P.*, supra.

III.

Appellants were unequivocally advised by the Commission that the privilege against self-incrimination was available. The chairman of the Commission testified that it was the policy of the Commission not to press for answers to incriminating information. The Commission therefore held and these appellants were assured that the Ohio Immunity Statute was not applicable. Nevertheless the Ohio Supreme Court held that since the Immunity Statute was applicable, the appellants' assertion of their privilege was contumacious. These appellants were convicted of willfully and deliberately defying the Commission by asserting their privilege even though the Commission had advised and accepted their use of the privilege. This is tantamount to entrapment. It makes a mockery of "fair play." It violates due process. *Smith* v. *O'Grady*, 312 U. S. 329; see *Palko* v. *Connecticut*, 302 U. S. 319.

IV.

The Ohio Commission was directed to investigate crimes against the federal government and other states and to "Maintain a liaison with any agency of the federal, state, or local governments in devising and promoting means of disclosing" subversive purposes. The Commission therefore purported to be an arm of the federal and other state governments in crime detection and enforcement. The Ohio Immunity Statute which was held applicable to the proceedings of this Commission does not and could not grant immunity from prosecutions by other governments and could not prohibit the use of appellants' compelled testimony in such prosecutions.

The Fifth Amendment privilege is emasculated if it is not available to witnesses in proceedings where the state is in effect an instrument of federal investigation. Certainly under such circumstances the Due Process Clause should be interpreted to include that Fifth Amendment guarantee. Due process is violated if the officials of one state can compel, through a state immunity statute, individuals to incriminate themselves under federal statutes. See *Knapp* v. *Schweitzer*, 357 U. S. 371; *Ullmann v. United States*, 350 U. S. 422; *Palko* v. *Connecticut*, supra.

ARGUMENT

APPELLANTS WERE CONSTITUTIONALLY PROTECTED AGAINST THE COMPELLED TESTIMONY DEMANDED OF THEM BY THE OHIO UN-AMERICAN ACTIVITIES COMMISSION.

I.

The Constitutionally Required Standards for Legislative Investigations Were Unequivocally Violated by the Un-American Activities Commission of Ohio at the Hearings at Which These Appellants Were Compelled to Give Testimony.

The Due Process Clause of the Fourteenth Amendment to the United States Constitution applies to state legislative investigating bodies. This Court in *Sweezy* v. *New Hampshire*, 354 U. S. 234 and *N. A. A. C. P.* v. *Alabama*, 357 U. S. 449, stated that the Due Process Clause protected witnesses from unjustified invasion by state legislative inquiry. The Court insisted in these cases that a free society cannot be assaulted and breached by turning otherwise lawful legislative investigations into political inquisitions and trials. The Court did more than require legislative investigations to conform to the broad reach of the Due Process Clause. In *Sweezy*, *N. A. A. C. P.*, and in *Watkins* v. *United States*, 354 U. S. 178 and *Quinn* v. *United States*,

349 U. S. 155, it established clear standards. It asserted that the multitude of legislatures, legislative investigating bodies, and witnesses, are not only guided by what is "implicit in the concept of ordered liberty" but also by defined precedent. For, as Mr. Justice Frankfurter said in another context, which is as applicable to investigating bodies as to policemen, in his dissenting opinion in *Harris* v. *United States*, 331 U. S. 145 at p. 173:

> "To sanction conduct such as this case reveals is to encourage police instrustion upon privacy, without legal warrant, in situations which go even beyond the facts of the present case. If it be said that an attempt to extend the present case may be curbed in subsequent litigation, it is important to remember that police conduct is not often subject to judicial scrutiny. *Day by day mischief may be done and precedents built up in practice long before the judiciary has an opportunity to intervene.*" (Emphasis supplied)

A. THE DELEGATION OF AUTHORITY TO THE COMMISSION WAS SO SWEEPING, INDISCRIMINATE AND VAGUE THAT THE CONSTITUTIONALLY REQUIRED PRELIMINARY CONTROL BY THE OHIO LEGISLATURE WAS NON-EXISTENT.

The mandate to the Commission was of such breadth and scope that it in effect authorized the Commission to investigate any person about any subject. The sweep of the definition of subversive persons or groups extended way beyond "conduct which is only remotely related to actual subversion and which is done completely free of any conscious intent to be a part of such activity." *Sweezy* at p. 247. For the Commission was authorized to investigate:

> "All facts concerning persons . . . whose activities might adversely affect . . . the functioning of any agency of the state or national government . . ."

The mere recitation of this authority suffices to show that the Commission was without restriction and being without restriction was without definable purpose. This Court has found more restrictive mandates fatally vague:

> "In deciding what to do with the power that has been conferred upon them, members of the Committee may act pursuant to motives that seem to them to be the highest. Their decisions, nevertheless, can lead to ruthless exposure of private lives in order to gather data that is neither desired by the Congress nor useful to it. Yet it is impossible in this circumstance, with constitutional freedoms in jeopardy, to declare that the Committee has ranged beyond the area committed to it by its parent assembly because the boundaries are so nebulous." *Watkins* at p. 205.

> "The lack of any indications that the legislature wanted the information the Attorney General attempted to elicit from petitioner must be treated as the absence of authority. It follows that the use of the contempt power . . . was not in accordance with the due process requirements of the Fourteenth Amendment." *Sweezy* at pp. 254-255.

This Commission was likewise without authority. Neither this Court nor the Ohio courts can determine with any assurance that the appellants refused to answer questions on matters which the Ohio Legislature sought information. Their convictions therefore violate due process and must be reversed.

B. THERE WAS NO CLEAR DETERMINATION BY THE OHIO LEGISLATURE THAT THE AUTHORIZED INQUIRY INTO THE AREA OF THE FIRST AMENDMENT FREEDOMS WAS JUSTIFIED BY A SPECIFIED LEGISLATIVE NEED.

Appellant Brown, who had been subpoenaed to give testimony, sat alone before the Commission, unrepre-

sented by counsel. The Commission had in no way indicated why he was before it and evidently was confused as to his union affiliations (R. 164-165). The Commission had an unlimited mandate to investigate. Appellant Brown was asked by the chairman of the Commission:

> "Were you active in 1947 in the election in the City of Cincinnati in supporting any candidate or any issue on the ballot in that election?" (R. 163).

Appellant Brown now stands convicted of contempt for refusing to answer such question. And at the trial of this case the objection by the State to a question concerning the relevance of such inquiry to the investigation was sustained (R. 63-64). The opinion in *Sweezy*, supra, at pp. 250-251 states:

> "Our form of government is built on a premise that each citizen shall have the right to engage in political expression and association. This right was enshrined in the first amendment of the Bill of Rights . . .
>
> We do not now conceive of any circumstance wherein a state interest would justify infringement of rights in these fields."

In his concurring opinion in *Sweezy*, supra, at p. 266, Mr. Justice Frankfurter wrote:

> "In the political realm, as in the academic, thought and actions are presumptively immune from inquisition by political authority. It cannot require argument that inquiry would be barred to ascertain whether a citizen had voted for one or the other of the two major parties either in a state or national election."

At these same hearings appellant Stern was asked about his work in the Progressive Party and found guilty of contempt for refusing to answer (R. 139). On the trial in

this case when the counsel for the Commission was asked as to the relevancy of the questioning concerning the Progressive Party, an objection by the State was sustained (R. 61-62). And appellant Raley was sentenced for refusing to respond to inquiries about pamphlets he had distributed (R. 99) and public protests he had made (R. 96). And appellant Brown was also asked about Progressive Party activities (R. 156). Many other questions involved appellants' associates and associations. *N. A. A. C. P.*, supra, held that free association was integral to our democratic commitments:

> "It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment which embraces freedom of speech." (at p. 460)

United States v. *Rumely*, 345 U. S. 41, confirmed that the First Amendment prohibits legislative inquiry where it prohibits legislation. And *De Jonge* v. *Oregon*, 299 U. S. 353, held that associates and associations could not be the leverage by which the First Amendment freedoms could be impaired:

> "The question, if the rights of free speech and peaceable assembly are to be preserved, is not as to the auspices under which the meeting is held but as to its purpose; not as to the relations of the speakers, but whether their utterances transcend the bounds of the freedom of speech which the Constitution protects." (at p. 365)

These hearings were held on October 20, 1952 with a national election day only several weeks' away. The Commission's authority was sweeping and unrestricted. It proceeded to compel testimony concerning political beliefs and activities. In doing so it struck at the very heart of a demo-

cratic society and in a way proscribed and condemned by this Court itself. Throughout the hearings many of the questions asked these appellants involved their opinions, their affiliations, their public protests and the like. Freedom is more than the specific commands of laws and constitutions. Freedom encourages public political expression. Freedom welcomes discussion and protests. So when authority, whether high or low, compels citizens of this country to reveal, to explain and to justify their participation in public affairs whether at the voting booth or in newspaper interviews or in discussions of international or economic problems, it is required to show that a paramount interest of the state in obtaining this information transcends the freedom of the individuals questioned. It must demonstrate an overriding need to resort to procedures which will compel many people to withdraw from their community affairs, or to speak more cautiously, or to associate less freely, in order to avoid the subpoena, the focus of publicity, and the multitude of needling questions by investigating committees which must be answered under penalty of contempt.

There is nothing in the Record nor, it is submitted, could there be anything in the Record, which shows that Ohio found that a compelling legislative purpose required such a bruising invasion of these precious constitutional liberties. The "mere semblance of legislative purpose would not justify an inquiry in the face of the Bill of Rights. . . . We cannot simply assume . . . that every Congressional investigation is justified by a public need that overbalances any private rights affected." *Watkins*, supra, at p. 198. The State of Ohio has not "demonstrated an interest in obtaining the disclosures" it sought from appellants "to justify the deterrent effect" such disclosures have "on the free exercise" by appellants "of their constitutionally protected right of association." *N. A. A. C. P.*,

supra, at p. 463. The state of Ohio has not shown that its subordinating interest is compelling. *Sweezy*, supra, at p. 265 (concurring opinion).

C. THE APPELLANTS WERE NOT ABLE TO DETERMINE WHETHER THE QUESTIONS ASKED THEM WERE PERTINENT TO THE MATTER UNDER INQUIRY NOR WERE THEY GIVEN ANY INDICATION THAT THE COMMISSION REJECTED THEIR ASSERTIONS OF THEIR PRIVILEGE AGAINST SELF-INCRIMINATION AND CONSIDERED SUCH ASSERTIONS CONTUMACIOUS.

Each of these appellants now stands convicted and sentenced for committing an act—i.e., refusing to answer a question—which at the time he committed it neither he nor this Court could have determined was an illegal act and therefore punishable by fine and imprisonment for contempt. From the confusing breadth of the legislative mandate to the Commission these appellants could not discover whether the questions asked them were authorized by the Ohio Legislature, were responsive to the legislative purpose for which the Commission had been established, and were pertinent to the matter under inquiry. It should not be overlooked moreover that the indictments did not allege that the questions which appellants refused to answer were pertinent to any legislative inquiry (R. 10, 14, 16). This Court stated in *Watkins*, supra, at pp. 208-209:

> "It is obvious that a person compelled (to determine the pertinence of the question) is entitled to have knowledge of the subject to which the interrogation is deemed pertinent. That knowledge must be available with the same degree of explicitness and clarity that the Due Process Clause requires in the expression of any element of a criminal offense. The 'vice of vagueness' must be avoided here as in all other crimes."

Certainly the mandate to the Commission could not be used by these appellants as a guide to the matter under inquiry or to the pertinence of questions asked them. In addition, moreover, they received no clarification from the Commission. In *Barenblatt* v. *United States*, 252 F. 2d 129, the Court of Appeals, with four judges dissenting, found that the investigating committee and its counsel had gone to some length to indicate the pertinency of the questions and that the subject of the investigations was not a "mere re-hash" of the vague authorizing resolution. It concluded that the witness was in a position to judge the pertinency of the questions. Such was not the situation in this case. The Commission did not even attempt to state, clarify or define the subject of the investigation or the purpose of compelling appellants' testimony. It either foreclosed discussion of the matter (R. 108, 146-147, 150-151) or used equally vague generalities (R. 78, 80-81, 116).

An investigating body operating under a mandate which has not been carefully drawn and the legislative purpose of which is obscure easily degenerates into conducting trials not investigations. Due process does not permit private citizens who have not been indicted for any crime to be subjected to wholesale inquisition and the glare of malevolent publicity. No witness, no matter how well informed, can protect himself from such an assault. Even if he had counsel present with full authority to advise and object, the absence of any basis for determining pertinence makes such assistance unavailing. The language of this Court in *Watts* v. *Indiana*, 338 U. S. 49, 55 is as persuasive and as valid when applied to legislative interrogation as when applied to police interrogation:

> "Protracted, systematic and uncontrolled subjection of an accused to interrogation by the police for the purpose of eliciting disclosures or confessions is subversive of the accusatorial system."

And Justice Frankfurter in his concurring opinion in *Sweezy*, supra, at pp. 263-264 pointed out:

> "This kind of evil grows by what it is allowed to feed on. The admonition of this Court in another context is applicable here. 'It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure.' *Boyd v. United States*, 116 U. S. 616, 635."

The Record shows that in only one instance did the Commission specifically order and direct an answer (R. 132). Thus, in all but that one instance the appellants had every reason to assume that the Commission had accepted their assertions of the privilege. In a great majority of the questions asked, including the questions which formed the counts in the indictments, the Record shows that the Commission without comment or rebuttal moved on to the next question. These appellants were never "confronted with the clear-cut choice between compliance and non-compliance, between answering the question and risking prosecution for contempt." *Quinn*, supra, at p. 166. See *Flaxer* v. *United States*, (October Term, 1958 No. 60 decided December 15, 1958). Certainly the actions, responses and statements of the Commission when the appellants asserted their privilege fell far "short of the prior positive notification of a possible criminal penalty for a procedural condition precedent to the imposition of such penalty." *Daschbach* v. *United States*, 254 F. 2d 687, 691. Penal consequences do not follow a wrong guess at legislative interrogations:

> "The witness is not required to enter into a guessing game when called upon to appear before a committee. The burden is upon the presiding member to make clear the directions of the committee, to consider any

reasonable explanation given by the witness, and then to rule on witness's response." *United States* v. *Knapp*, 102 F. Supp. 757, 759.

Does due process prevail when a citizen is subpoenaed before a legislative committee which is authorized under its mandate to investigate "All facts concerning persons . . . whose activities might adversely affect . . . the functioning of any agency of the state . . . ", receives absolutely no information from the Commission as to the matter under inquiry at that session or the purpose of compelling his testimony, asserts his constitutional rights both under the United States and Ohio Constitutions in answer to a question, is given not even the slightest hint that the Commission does not accept his assertion, and then later is indicted, convicted, and sentenced to fine and imprisonment for such assertion? Surely it does not or its high function in preventing the decay of a free society has been mutilated. Only by insistent judicial commands will a free society be assured that the pattern of conduct of its public officials—legislative and administrative—habitually conforms to approved standards and does not lapse, by design or inertia, into the high-handed and persecutorial conduct characteristic of public officials in a dictatorship. The Due Process Clause bars legislative investigations which violate our basic notions of "fair play" and vitiates convictions resulting therefrom.

D. THE HEARINGS BEFORE WHICH THESE APPELLANTS WERE COMPELLED TO TESTIFY DEMONSTRATE THAT THE COMMISSION WAS PURSUING THE UNLAWFUL LEGISLATIVE PURPOSE OF ATTEMPTING TO DISCLOSE AND EXPOSE THE APPELLANTS AS "SUBVERSIVES."

The mandate to the Commission directed it to devise and promote "means of disclosing those persons . . . who seek to destroy the government of this state or of the United States by force, violence, intimidation, sabotage, or threats of the same." And throughout the hearings it is clear that the Commission appeared almost exclusively concerned with trying to prove that the appellants engaged in illegal or "subversive" activities. Each of the following typical questions was preceded by "Is it not a fact" or similar language:

> ". . . Victor Decavitch identified you to your face as a member of the Communist Party . . .?" (R. 84).
>
> ". . . Marjorie Gruss . . . accused you to your face of having been a member of the Communist Party . . .?" R. 86).
>
> ". . . you were arrested by the Davenport, Iowa, Police Department . . . ?" (R. 136).
>
> ". . . you were again arrested by the Davenport, Iowa, Police Department . . . ?" (R. 137).
>
> ". . . when you falsely and fraudulently signed that affidavit . . . ?" (R. 143).
>
> ". . . you founded . . . the South Avondale Playground Mothers Club, in order to attempt to secure recruits for the Communist Party?" (R. 146).
>
> ". . . you obtained a false and fraudulent medical certificate . . . ?" (R. 153).
>
> ". . . you falsely and fraudulently obtained money from the State of Ohio . . . ?" (R. 162).
>
> ". . . you are now . . . an active member of the Communist Party . . . ?" (R. 162).

Appellants were barraged with such questions. There is not the slightest suggestion in any question or statement by the Commission at these hearings indicating that it was seeking information or facts on which to recommend legis-

lation to the Ohio Legislature (R. 75-165). In fact, the chairman in his opening statement at the hearings defined the Commission's purpose by stating that appellants feared "exposure of un-American activities. . . ." The appellants were treated as though they were on trial as criminal defendants. It was an inquisition not an investigation. It was exposure not inquiry.

> ". . . Nor is the Congress a law enforcement or trial agency. These are functions of the executive and judicial departments of government. No inquiry is an end in itself; it must be related to and in furtherance of a legitimate task of the Congress. Investigations conducted solely for the personal aggrandizement of the investigators or to 'punish' those investigated are indefensible." *Watkins*, supra, at p. 187.

Unfortunately for our society many legislative investigating committees have constantly revealed a desire to stigmatize, to expose, and to assume the role of judge and jury in the establishment of public opinion and policy. (See *Barsky* v. *United States*, 167 F. 2d 241; Carr, *The Un-American Activities Committee*, 18 U. of Chicago Law Review 598 (1951); Gelhorn, *The States and Subversion* (1952); Barrett, *The Tenney Committee: Legislative Investigations of Subversive Activities in California* (1951); Countryman, *Un-American Activities in the State of Washington* (1951).[2] This is not a legislative function and when it results in subjecting private citizens not only to needling inquisitions but also to fines and imprisonment, it violates their guaranteed liberties.

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[2] Cases now pending in this Court further corroborate the abuses which characterize many of these committees. *Barenblatt* v. *United States* (October Term—1958, No. 35); *Scull* v. *Virginia* (October Term—1958, No. 51); *Uphaus* v. *Wyman* (October Term—1958, No. 778).

II.

The Ohio Un-American Activities Commission Was Authorized and Directed to Investigate in the Area of Sedition in Which Area United States Congressional Action Has Preempted and Superseded the Power of the State.

In *Pennsylvania* v. *Nelson*, 350 U. S. 497, this Court held that Congress had occupied the field of sedition and subversive activities to the exclusion of parallel state legislation and that the dominant interest of the federal government in that field precluded state intervention. Thus, the Ohio Legislature could not constitutionally enact any legislation in the area over which this Commission had been given such broad powers of investigation: "national defense," "the overthrow or reform of our constitutional governments by force, fraud, violence or other unlawful means"; "allegiance to a foreign power"; "activities (which) might adversely affect the contribution of this state to the national defense" or the "safety and security of this state . . . or national government."

Since the Legislature was precluded from legislating in this field of subversion and sedition (see *Commonwealth* v. *Gilbert*, 134 N. E. 2d 12 (Mass. 1956)), it had no legitimate legislative function to perform in investigating in this field. Appellants subpoenaed to testify before a Commission, which was "in the legislative branch of the government" (R. C. 103.31), could not be compelled under penalty of contempt to respond to an inquiry which was not "related to and in furtherance of a legitimate task" of the legislature. *Watkins*, supra, at p. 187.

In fact these appellants were almost exclusively interrogated about alleged Communist Party activities and associations in and out of the State of Ohio. The chairman and counsel of the Commission moreover testified that the purpose of the investigation of these appellants was only in

connection with Communist Party activities (R. 37, 55-57). Not only does seditious Communist Party activity necessarily involve the nation, but in addition the Smith Act (18 U. S. C. Sec. 2385) proscribes activity in connection with all governments in the United States.

Due process certainly forbids citizens to be fined and imprisoned for refusing to testify in front of a legislative commission which had no lawful legislative purpose.

III.

Although Appellants Were Specifically and Repeatedly Advised by the Commission That They Were Protected by Their Constitutional Provilege Against Self-Incrimination, Their Convictions Were Finally Sustained by the Supreme Court of Ohio On the Basis That They Were Not Protected by Such Privilege Since the Ohio Immunity Statute Removed the Need For It.

Appellants have been fined and sentenced for contempt of the Commission not because they did not accept the instructions of that Commission but because they did accept the instructions of that Commission. The Commission advised each of them clearly and unequivocally that he would not be compelled to answer questions which might tend to incriminate him. The chairman of the Commission corroborated this as the "policy of the Commission" in his testimony. And the appellants asserted their privilege to each of the questions which form the counts in their indictments. Nevertheless the Supreme Court of Ohio held, after conceding that the chairman of the Commission "obviously misstated the law", that since under the Immunity Statute the privilege was not available, the use of the privilege was intentional and willful contumacy. It is this reasoning which sustains appellants' convictions.

The Court of Appeals for the First District of Ohio said in this case (R. 196):

> "... Even assuming the applicability of the immunity statute, the state still had the burden of proving that the refusal to answer was the deliberate act of the defendant, with the knowledge of the consequences, in order to give the act the character of contumacy essential to a conviction for contempt."

How can the State show that appellants' assertions were deliberate defiances with knowledge of the consequences when they were made with the advice and consent of the very body of which they are now held to have been in contempt? Judge Stewart in his dissent in the Supreme Court of Ohio asserted (R. 237):

> "It seems to me that, since the defendants were apprised by the commission at the time they were testifying that they had a right to refuse to answer questions which might incriminate them, they could not possibly in following the admonition of the commission be in contempt of it except possibly as to the questions which the defendants were directed to answer."

If due process means "fair play," certainly these appellants have been denied it.

> "The allowance of the privilege would be a mockery of justice, if either party is to be affected injuriously by it." *Phelin* v. *Kenderdine*, 20 Pa. 354, 363. See *Johnson* v. *United States*, 318 U. S. 189.

It is not claimed that the Commission knowingly decoyed appellants into this position. But is the unsavory character of entrapment substantially mitigated if public officials unwittingly mislead citizens into fines and imprisonment? Was it incumbent on the appellants to reject the privilege proffered by the Commission?

> "For his petition presents a picture of a defendant, without counsel, bewildered by court processes strange

and unfamiliar to him, and inveigled by false statements of state law enforcement officers into entering a plea of guilty." *Smith* v. *O'Grady*, 312 U. S. 329, 334.

This Court cannot tell what answers these appellants might have given had the applicability and constitutionality of the Ohio Immunity Statute been made clear to them. Certainly convictions cannot be sustained on assumptions of what might have been. It is a reasonable deduction, moreover, that the seemingly inconsistent and sporadic selection of questions on which the indictments were based stems from an acceptance by the State at that time that the answers to the other questions were protected by the privilege. And that through its highest court the State changed its mind—all to the injury of the appellants. The "canons of decency and fairness which express the notions of English-speaking peoples . . ." (*Rochin* v. *California*, 342 U. S. 165, 169) invoked by due process require "that state action, whether through one agency or another, shall be consistent with the fundamental principles of liberty and justice which lie at the base of our civil and political institutions." *Herbert* v. *Louisiana*, 272 U. S. 312, 316. See also *Palko* v. *Connecticut*, 302 U. S. 319; *Twining* v. *New Jersey*, 211 U. S. 78; *Snyder* v. *Massachusetts*, 291 U. S. 97. A society which ostracizes the unfair and exalts the fair cannot tolerate the procedures which would send these appellants to jail.

IV.

The Ohio Immunity Statute Which Was Applied In This Case Does Not and Could Not Grant Immunity From Prosecution by the United States or Other States and Yet the Un-American Activities Commission of Ohio Was Directed to Make Disclosures About Matters Which Could Become the Basis for Prosecution Under Federal and State Laws to Any Agency of the Federal, State or Local Governments.

The mandate of the Ohio un-American activities commission directs an investigation, among other things, of "all facts relating to the activities of persons, groups and organizations" having or suspected of having "the overthrow or reform of our constitutional *governments* by fraud, force, violence or other unlawful means"; of "All facts concerning persons, groups and organizations . . . whose activities might adversely affect the contribution" of the State of Ohio "to the *national* defense" and "the functioning of any agency of the state of *national government*, . . ." "The operation and effect of the laws of this state, of the *several other states*, and of the United States, which purport to outlaw and control" certain enumerated activities and "to recommend such additional legislation or revision of existing laws as may seem advisable or necessary;" and "Maintain a liaison with any agency of the *federal, state,* or *local governments* in devising and promoting *means of disclosing* those persons and groups who seek to alter or destroy the government of this state or of the *United States* by force, violence, intimidation, sabotage, or threats of the same." (Emphasis supplied.)

For the present issue, the crucial aspect of the Commission's objectives was the delegation of the right to investigate and communicate beyond Ohio's jurisdictional limits.

In contrast, the Ohio Immunity Statute is necessarily narrow in benefit. For while the Commission was investigating as widely as its mandate directed, that mandate could not confer immunity beyond the limits of Ohio. The appellants had reason to forecast the transmission of any testimony given by them to agencies of other governments for use completely unaffected by any immunity conferred by Ohio R. C. 101.44.

A. THE PRECISE QUESTION BEFORE THIS COURT IS ONE OF FIRST IMPRESSION.

The question whether a witness may invoke the privilege against self-incrimination in an investigation of federal and extra-state matters by a state agency, either under the Fifth Amendment or as a matter of due process under the Fourteenth Amendment, has never been decided by this Court. Cf. *Knapp* v. *Schweitzer*, 357 U. S. 371; *Feldman* v. *United States*, 322 U. S. 487; *United States* v. *Murdock*, 284 U. S. 141; *Jack* v. *Kansas*, 199 U. S. 372. In fact in the *Knapp* case the court specifically refused to decide whether a witness could successfully assert his federal privilege in a state proceeding for the reason that "the record . . . is barren of evidence that the state was used as an instrument of federal prosecution or *investigation*." (Emphasis supplied). *Knapp* v. *Schweitzer*, supra, p. 380. Far from barren on the point, the mandate of the Commission in the instant case sprouts with evidence that the state has made itself a federal instrument. Moreover, one concurring and three dissenting judges in the *Knapp* case indicated with varying degrees of emphasis that the doctrine expressed in the *Feldman* case,—that evidence compelled under a state immunity statute can be used later in a federal prosecution where there was no federal participation in the compulsion—was not settled and reconsideration not foreclosed. Of course, if such use can be made of state-compelled testimony, the inefficacy of immunity proffered by a state is obvious. Cf. *Ullmann* v. *United States*, 350 U. S. 422.

In the *Murdock* case, the court was careful to point out that only federal questions were in issue and the question of the effect of the assertion of the privilege had it rested "upon any claim that the inquiries were being made to discover evidence of crime against the state law" id. 149, was not before it. "Nothing of state concern was in-

volved" id. 149. Implicit in the careful exclusion of the state question from the force of the *Murdock* rule is the suggestion that had a state question been involved the court might not have ruled against the availability of the privilege.

B. THE FEDERAL PRIVILEGE AGAINST COMPULSORY SELF-INCRIMINATION IF OTHERWISE APPROPRIATELY INVOKED, SHOULD BE READ INTO THE DUE PROCESS CLAUSE AND BE AVAILABLE TO THE WITNESS IN A STATE CONDUCTED INQUIRY INTO FEDERAL MATTERS.

These appellants were the unwilling instruments of a state inquiry into extra-state and federal affairs. Here the Commission undertook investigation and liaison looking to disclosures of crimes (potentially involving these appellants) to governments—federal, state and local—other than its own. Under such circumstances the rule announced in *Counselman* v. *Hitchock*, 142 U. S. 547, is particularly apposite. For that case established the general proposition that a valid immunity statute must protect as broadly as the privilege. It remained for later decisions to qualify the generality of the *Counselman* rule but never in the situation which prevailed here.

Where federal agents have participated officially in state sponsored searches and seizures, the legality of the search will be considered as though the search itself was a federal undertaking and the standards of the Fourth Amendment of the United States Constitution applied in a federal prosecution. See *Byars* v. *United States*, 273 U. S. 28, 32-33, *Feldman* v. *United States*, supra. The majority opinion indicated by way of dictum in *Knapp* v. *Schweitzer*, supra, at 380, that with similar participation in securing compelled testimony the protection of the Fifth Amendment

could be asserted in a federal prosecution. Thus a federal element may raise federal rights.

Early in the history of this Court, Chief Justice Marshall had occasion in *United States* v. *Saline Bank*, 1 Peters 100 to consider the effect of a bill of discovery in federal court on the possibility of penalties against the defendants under Virginia statutes:

> "It is apparent, that in every step of the suit, the facts required to be discovered in support of this suit would expose the parties to danger. The rule clearly is, that a party is not bound to make any discovery which would expose him to penalties, and this case falls within it." Cf. dictum by Justice Holmes in *Bollman* v. *Fagen*, 200 U. S. 186, 195 (1906).

It is clear that Chief Justice Marshall had no difficulty with the conclusion that in federal inquiries involving a state statute defendants are protected against disclosures exposing them to penalties under state law. Passing the implications of the case for the whole concept of duality in relation to immunity statutes having application only in a single jurisdiction, it would seem to follow by analogy that a state agency sponsoring inquiry into the federal domain cannot require witnesses, as in the present case, to make revelations exposing them to federal penalties.

In the significant and comparatively recent case of *United States* v. *DiCarlo*, 102 F. Supp. 597, 605-606, where, reviewing a witness's refusal to testify before a senate committee empowered to investigate state crime, the court said:

> ". . . Congressional Power to investigate violations of state laws does not include the power to nullify the state constitutional rights of a witness.
>
> * * *

> The foregoing considerations lead inescapably to the conclusion that the defendant is entitled to immunity against disclosures that might incriminate him of violations of state law as well as immunity against self-incrimination of a federal crime. If this conclusion cannot be said to rest upon the principle of state supremacy in the domain of reserved powers, . . . it finds ample support in the principle that the Fifth Amendment operates as a restraint upon federal officers investigating state crimes."

It is equally clear that the power of a state legislative investigating commission to investigate the operation of federal law with a duty to maintain liaison with and "disclose" crimes to the federal government does not include the power to nullify the federal constitutional rights of a witness. And these appellants are entitled to have the privilege of the Fifth Amendment read into the Fourteenth to protect them against disclosures that may incriminate them of violations of federal law. Obviously immunity against self-incrimination of a state crime does not reach the issue. For this reason appellants' conviction should be reversed.

C. THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT SHOULD, UNDER THE CIRCUMSTANCES OF THIS CASE, SUSTAIN THE RIGHT OF THESE APPELLANTS TO REMAIN SILENT REGARDLESS OF POSSIBLE IMMUNUITY UNDER THE STATE STATUTE.

Where a state gratuitously injects itself into federal affairs, as here, the propriety of the availability to witnesses of the privilege against self-incrimination is especially appealing as a matter of due process. Otherwise witnesses in the posture of the present appellants, presumably guarded by both the Ohio and the federal privilege against self-incrimination, would be denied the benefit of both.

The Ohio effort at immunity, broadly phrased as it is, can have no effect outside state limits. Cf. *Jack* v. *Kansas*, supra, at p. 380. For the Ohio legislature has no paramount areas of concern equivalent to the national security which would empower it to prevent use of immunized evidence or block prosecution in "any court" as this court held the Congress could in *Ullmann* v. *United States*, supra. See also *Brown* v. *Walker*, 161 U. S. 591, dissent by Justices Shiras, Gray and White at 622-624.

The reach of the Due Process Clause is such that no rigid formula can be devised, or stated, for its universal application. From this there is no necessary implication that any right equivalent to a right within the first eight Amendments to the Constitution is *not* protected by it *if justice demands*. Cf. *Twining* v. *New Jersey*, 211 U. S. 78, 99, and see especially *Rochin* v. *California*, 342 U. S. 165, 169.

Does a particular action by a state "violate a 'principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental' " *Palko* v. *Connecticut*, 302 U. S. 319, 324-325. If so, due process prohibits it. What more classic occasion for its application than when a state, in effect, announces to witnesses:—We propose to take away your right to silence under state law and find you in contempt. But if you talk, we propose to communicate the content of your speech to the federal government. Be silent and land in our jail. Speak and land in theirs.

This hypothesis exaggerates the state's attitude only slightly and appellants' choice not at all. Here is a shocking example of that unfairness which activates the proscriptions of due process and justifies the reversal of the convictions below.

CONCLUSION

For the foregoing reasons it is submitted that appellants were constitutionally protected against the compelled tes-

timony demanded of them by the Ohio un-American activities commission, and that the judgments affirming their convictions and sentences must accordingly be reversed.

Respectfully submitted,

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APPENDIX A

Questions for Which the Appellants in Refusing to Answer Were Indicted.

APPELLANT RALEY

1. "Q. Now, Mr. Raley, as an official of the United Electrical Workers, is there any concern among the officials of the possible presence of Communist Party members among the leadership of the UE?" (R. 83).

2. "Q. Now, as a matter of fact, Victor Decavitch was formerly district president of the UE, was he not?" (R. 85).

3. "Q. Now, as a matter of fact, that was the headquarters of Local 766 of the UE at that time; isn't that correct?" (R. 91).

4. "Q. According to the Daily Worker for June 8, 1949, five United Electrical Workers issued statements—five Electrical leaders, pardon me, issued protests against the jailing of Gus Hall, Henry Winston and John Gates, and it listed those five protestors as Lem Markland, Herbert Hirschberg, Joe Sheetz, John Thomas, and Talmadge Raley. Did you as a UE leader issue a protest against the jailing of these three men?" (R. 96).

5. "Q. Do you know Herbert Hirschberg?" (R. 97).

6. "Q. Do you know Joseph Sheetz?" (R. 97).

7. "Q. Do you know John Thomas?" (R. 97).

8. "Q. As a matter of fact every one of these individuals are leaders of the UE, or were leaders of the UE at that time, were they not, Mr. Raley?" (R. 97).

9. "Q. Let me refer to an article carried in the Cincinnati Post on September 13, 1949, captioned 'Schools Trace Communist Propaganda. Union Agent Denies Kits Are Leftist,' and refers to an interview with you. Do you recall that interview?" (R. 99).

10. "Q. I wonder if you are familiar with, or happen to know Jerome Joseph?" (R. 103).

11. "Q. Victor Pasche; do you know him?" (R. 103).

12. "Q. Do you happen to know Herbert Siens?" (R. 103).

13. "Q. Do you happen to know Marie Reed Haug?" (R. 103).

14. "Q. Do you happen to know Paul Shepherd?" (R. 103).

15. "Q. Isn't it a fact that the people I have just listed are all prominent in the leadership of the UE in Cleveland, Ohio?" (R. 103).

16. "Q. Who has a similar—holds your position in the Cleveland area at the present time, with the union?" (R. 106.)

APPELLANT STERN

1. "Q. Where do you reside, Mr. Stern?" (R. 132).

2. "Q. I ask you if it is not a fact that Frank Hashmall assigned you to work in the Progressive Party in this county?" (R. 139).

APPELLANT BROWN

1. "Q. And what has been your educational background?" (R. 150).

2. "Q. Mr. Brown, were you ever employed by the Fisher Body Plant at Norwood, Ohio?" (R. 163).

3. "Q. Is there anything about being employed at that plant which might tend to incriminate you?" (R. 163).

4. "Q. Were you active in 1947 in the election in the City of Cincinnati in supporting any candidate or any issue on the ballot in that election?" (R. 163).

Brief for Appellant

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No. 175

In the

Supreme Court of the United States

October Term, 1958

TALMADGE RALEY, JOSEPH STERN, EMMETT CALVIN BROWN,

Appellants,

vs.

STATE OF OHIO,

Appellee.

Appeal From the Supreme Court of Ohio

BRIEF FOR APPELLEE

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In the

SUPREME COURT OF THE UNITED STATES

October Term, 1958

No. 175

TALMADGE RALEY, JOSEPH STERN, EMMETT CALVIN BROWN,

Appellants,

vs.

STATE OF OHIO,

Appellee.

BRIEF FOR APPELLEE

I. THESE APPEALS ARE NOT AUTHORIZED

(a) The federal statute provides that final judgments of the highest court of the state (in this instance, two judgments of the Supreme Court of Ohio **State v. Raley, et al.**, 164 O.S. 529 and **State v. Raley, et al.**, 167 O.S. 295) may be reviewed by the Supreme Court of the United States when:

1. The state statute is repugnant to a law of the United States, or

2. A state statute is repugnant to the Constitution of the United States.

The only state *law* in this record which could possibly be repugnant to any *law* of the United States, is the statute

providing for the creation and operation by the General Assembly of an Un-American Activities Commission (**Sections 103.31 et seq.** of the **Revised Code of Ohio**, and particularly **Sections 103.34** and **103.35** of the **Revised Code** relating to the powers and duties of the Commission and of its Chairman). The only possible *law* of the United States to which the above statutes are alleged by appellants to be repugnant, is that federal enactment known as the **Smith Act (Title 18, U.S.C., Section 2383).** (emphasis added)

The Smith Act parallels very closely various Criminal Syndicalism penal statutes of the State of Ohio, particularly **Sections 2921.01** to **2921.27 inc.**, and **Sections 2923.12** to **2923.15 inc.** of the **Revised Code.** It should be noted that none of the previous charges, trials, statutes, or convictions involved in these appeals, have any reference whatsoever to the aforesaid statutes. If this were so, the situation presented to the court here would be within this court's determination in **Pennsylvania v. Nelson** which seems to be the sole authority (350 U.S. 497) relied upon by appellants as the basis for conferring appellate jurisdiction upon this court because of a claimed repugnance of two laws.

We are concerned on this aspect of the claim of jurisdiction solely with the right of a state legislature to investigate not only those matters which may have been subsequently found to be inhibited by the Smith Act, *if made the subject of a criminal prosecution*, but also related matters of particular interest to the state as such and not barred to it by **Nelson** or any other known interpretation of the dominant interest of the federal system in certain criminal matters. The investigating commission with which we are here concerned, in addition to any related or over-lapping field of federal activity, was directed to:

> "Investigate, study and analyze * * * persons, groups and organizations * * * whose activities might ad-

versely affect the contribution of this state to the national defense, the safety and security of this state, the functioning of any agency of the state or national government or the industrial potential of this state." (R.C. 103.34(2)).

The commission was also directed to:

"investigate, study and analyze the operation and effect of the laws of this state, of the several other states, and of the United States, which purported to outlaw and control the activities enumerated in this section, and to recommend such additional legislation or revision of existing laws as may seem desirable and necessary." (R.C. 103.34(3))

Nowhere in the Smith Act itself or as it is interpreted and applied in **Nelson**, can there be found any prohibition against legislative interest in the above fields even if such legitimate interest were ultimately expressed in new or amended statutes.

The statutes providing for an Ohio Un-American Activities Commission, however, do not even touch upon the state criminal prosecutions prohibited by **Nelson.** What appellants are asking this court to do, in accepting jurisdiction on this basis, is to tell a state that there are fields in which federal interest is so dominant that a state legislature *may not even consider or cogitate* upon the state's relationship to them. The complete absurdity of such a position may be demonstrated by the body of the **Constitution of the United States**, itself where, in **Article V**, it is provided that:

"On the application of the legislatures of two-thirds of the several states" (the Congress shall call a convention for proposing amendments to this Constitution).

Appellants interpretation of the *right* of the state legislature to investigate fields even of *exclusive* federal authority, could completely nullify an important provision of the Federal Constitution itself. (emphasis added).

We are concerned, at this point, not with the *right* of the state to enact and enforce anti-subversive laws prohibited to it. We are concerned solely with the *right* of a state legislature to ascertain facts upon grave matters of importance to both the state and the nation as a whole. These appellants have been convicted of contempt of the legislature and have not been convicted of any criminal violations even remotely concerned with any federal law.

Consequently, it is submitted that this court does not have jurisdiction of these appeals on the ground that the state statute in question is repugnant to any law of the United States.

(b) Appellants further invoke the appellate jurisdiction of this court on the ground that the proceedings had in these cases are repugnant to the Constitution of the United States, particularly the 14th Amendment thereof, in that there has been a failure of due process of law.

Without infringing upon a further and more detailed discussion of the application of due process of law to the basic merit of these convictions, it should be noted, as to the claimed appellate jurisdiction of this court, that these convictions were had pursuant to a general statute of the state providing for the creation of a legislative commission; giving its chairman certain powers relative to the attendance of witnesses and certain instructions on the procedure to be followed in the case of a witnesses' refusal to be sworn, to testify, or to produce documents. Again, by specific statute, in prosecutions resulting from any contempts believed to have been committed before

the commission, the matter was required to be referred to normal and orthodox enforcement procedures through the office of the Prosecuting Attorney in the state court of general civil and criminal jurisdiction by way of information or indictment leading to a normal, standard trial at which the defendants would be entitled by State Constitution to a jury trial (unless they themselves chose specifically to waive it as they did in these cases) and to an ordinary criminal judgment provided in a general criminal contempt statute. Aside from the manner of calling the alleged violation of law to the attention of the usual prosecuting and judicial officers, the due process of law applied in this case is different in no respect whatsoever from that provided for any other criminal charge in the State of Ohio. The same may be said for the state appellate proceedings following the convictions of these appellants.

The record is clear that with the exception of one refusal by the defendant Stern (Where do you reside, Mr. Stern? R.-132) every other refusal for which these defendants were indicted related to the field of activity in regard to either labor or industry within the State of Ohio, —matters which are of particular and legitimate concern to the state; specifically delegated to the commission as part of its statutory duty; and unrelated to any dominant or exclusive federal interest. The sole possible exception to this condition, in addition to the one noted as to Stern above, is the question directed to the defendant Brown (R.-163), where it was asked whether or not he was *active in an election*. It will be noted that Brown was not asked what candidate or issue he supported, but merely whether or not he exercised the freedom of speech and electioneering to which he was unquestionably entitled. (emphasis added)

On the basis of firmly established and universally applied state standards for the orderly and normal enforcement of its penal statutes, there can seem to be no possible doubt but that these defendants were accorded full and complete procedural due process of law as that constitutional requirement is enjoined upon this court in its appellate functions under the applicable federal statute.

(c) There is a further claim to appellate jurisdiction in this court by virtue of various cases which culminate in **Watkins v. United States,** 354 U.S. 178 and **Sweezy v. New Hampshire,** 354 U.S. 234. Claim is made by appellants that the delegation of authority to the commission was, (inter alia,) sweeping, indiscriminate, vague, without any clear determination that the authorized inquiry was justified by a legislative need; that witnesses were not able to determine whether questions propounded to them were pertinent, and that the commission's proceedings were, accordingly, without due process. Such claims and the commission's authority, if supportable by the record, might cause these appeals to fall within the realm of the two cases cited above. Upon examination of the record, however, it is apparent that the questions to which these defendants refused an answer are exactly those which this court indicates on page 213 of the **Watkins** decision would have had pertinency in the light of the commission's specific direction to inquire into the contribution of the state to the national defense, the industrial potential of the state, and the safety and security of the state.

> "The most serious doubts as to the Subcommittee's 'question under inquiry', however, stem from the precise questions that petitioner has been charged with refusing to answer. Under the terms of the statute, after all, it is these which must be proved pertinent. Petitioner is charged with refusing to tell the Subcom-

mittee whether or not he knew that certain named persons had been members of the Communist Party in the past. The Subcommittee's counsel read the list from the testimony of a previous witness who had identified them as Communists. Although this former witness was identified with labor, he had not stated that the persons he named were involved in union affairs. Of the thirty names propounded to petitioner, seven were completely unconnected with organized labor. One operated a beauty parlor. Another was a watchmaker. Several were identified as 'just citizens' or 'only Communists'. When almost a quarter of the persons on the list are not labor people, the inference becomes strong that the subject before the Subcommittee was not defined in terms of Communism in labor.

"The final source of evidence as to the 'question under inquiry' is the Chairman's response when petitioner objected to the questions on the grounds of lack of pertinency. The Chairman then announced that the Subcommittee was investigating 'subversion and subversive propaganda'. This is a subject at least as broad and indefinite as the authorizing resolution of the Committee, if not more so.

"Having exhausted the several possible indicia of the 'question under inquiry', we remain unenlightened as to the subject to which the questions asked petitioner were pertinent. Certainly, if the point is that obscure after trial and appeal, it was not adequately revealed to petitioner when he had to decide at his peril whether or not to answer. Fundamental fairness demands that no witness be compelled to make such a determination with so little guidance. Unless the subject matter has been made to appear with undisputable clarity, it is the duty of the investigative body, *upon objection of the witness on grounds of pertinency,* to state for the record the subject under inquiry at that time and the manner in which the propounded questions are pertinent thereto. To be meaningful, the explanation must describe

what the topic under inquiry is and the connective reasoning whereby the precise questions asked relate to it." (emphasis added)

These defendants, and particularly Raley, were not asked, as subjects of the indictment, whether they knew communists or whether other individuals were communists. Questions are directed obviously to the proposition of whether or not certain named individuals held certain positions in a particular industrial union and whether or not there is any concern among the officials of that union about the general subject of communist infiltration. Brown's refusal is to questions relating to the fact of his employment by a large industrial plant near Cincinnati. The commission's interrogation of Stern never "got off the ground", so that the question relative to the witnesses' understanding of its pertinency could not possibly have been determined by anybody, including this court.

The **Watkins** case holds variously that the inquiry must be related to the legitimate task of a legislature; that such investigations into individual affairs are invalid if unrelated to the legislative purpose. Syllabi (j) and (n) are particularly pertinent in this respect since the commission, in regard to these defendants and the refusals charged to them, very obviously was delving into a field related to the security of the state, its industrial potential and its possible contribution to national defense. It should further be noted that in **Watkins** the court sets out specifically the duty of the commission when questions are refused on grounds of pertinency. No such refusals on any such ground were ever claimed by any of the defendants in these cases.

It is difficult to see any application of **Sweezy v. New Hampshire** to the instant appeals other than that they both rise out of state legislative action. Questions which the

defendants refused here obviously did not concern themselves with any matter of academic freedom, freedom of speech, or freedom of assemblage, which this court held in **Sweezy**, as it had previously done in **Watkins**, were among certain individual rights, generally classifiable as 1st Amendment Rights, which could be subjected to legislative inquiry only under the most pressing circumstances. The attempted invasion of these rights in **Sweezy** is apparent. The alleged invasion of any such rights in the various counts contained in these indictments is wholly fictitious.

Appellee accordingly submits to the court on the subject of its appellate jurisdiction in these cases: that the state statute involved is not repugnant to any federal law under the theory of **Nelson**, or any other discernable theory; that it is not repugnant to the 14th Amendment of the Federal Constitution because the criminal procedure itself, and the witness activities before the commission from which the charges resulted, were in strict conformity with the commission's duty and with firmly based, normal criminal practice; and that the nature of the questions refused by the witnesses indicates clearly that they were pertinent and necessary in the light of the commission's proper interest in matters of exclusive concern to the State of Ohio and did not constitute unwarranted or unlawful invasions of the rights of the defendants either under Article I, Sections 1, 3, 7, and 10 of the Bill of Rights of the Constitution of Ohio, or under the 1st and 5th Amendments to the Constitution of the United States. Appellee accordingly prays that the question of jurisdiction heretofore deferred by this court in this matter be now determined adversely to the claimed entitlement of these defendants to the appellate jurisdiction of this court.

II THE ISSUE OF PERTINENCY HAS NO BEARING ON A DETERMINATION OF THESE CASES

Appellants lean heavily upon the cases of **Sweezy v. New Hampshire**, 354 U.S. 234 and **Watkins v. United States**, 354 U.S. 178, the former case being cited ten times in their brief and the latter nine times. It is appropriate in considering the problem at hand to inquire into the fact situation in both these cases. It is evident that both **Sweezy** and **Watkins** involved significantly different fact situations. In the **Watkins** case, the Chief Justice in delivering the opinion pointed out: (Page 182)

> "It is not the case of a truculent or contumacious witness who refused to answer all questions or who by boisterous or discourteous conduct disturbs the decorum of the committee room. Petitioner was prosecuted for refusing to make certain disclosures which *he asserted to be beyond the authority of the committee to demand.*" (emphasis added)

An examination of the facts indicate that Watkins in a prepared statement had indicated his willingness to cooperate with the committee except as to certain questions. Such questions he would refse to answer *a priori* on the basis that:

> "I do not believe that such questions are relevant to the work of this committee" (Page 185).

Thus was the issue joined. Watkins in the first instance raised the question of pertinency as to specific areas in which the committee sought information.

With a similar posture, Sweezy confronted his interrogators. In the opinion of the Chief Justice speaking for the Court (Page 238,) the following statement of facts appear:

> "During the course of inquiry petitioner declined to answer several questions. His reasons for doing so were given in a statement he read to the committee

at the outset of the hearing. *He declared he would not answer those questions which were not pertinent to the subject under inquiry.*" (emphasis added)

Both the statements of Watkins and Sweezy were courteous, temperate and in keeping with the solemnity of a duly authorized committee of Congress of the United States. These statements raised debatable legal issues. Compare them however with the abusive, violent, and vitriolic statements of Raley and Stern (R. 123-130) and Brown (R. 164-165) wherein the Ohio State Un-American Activities Commission and the Un-American Activities Committee of the Congress of the United States are vilified in these terms:

"Un-American characters who used witch hunting to hide their sell out of the people." (R. 125)
"Most other members of this commission have similar anti-union and anti-people record in the State Legislature." (R. 126)
"They have and will continue to parade scores of criminals, paid labor spies, stool pigeons, forgers, . . . and other types of gutter filth" (R. 127).
"These hearings are also used by the politicians to distract the attention of the voter from their sorid (sic) do-nothing record" (R. 127). "In recent years many hundreds of citizens . . . have been persecuted by daring to defend the handiwork of the fathers of our country . . . by refusing to cooperate with the committees similar to this" (R. 129).
"I have been personally called before the House Un-American Activities Committee of Washington, D.C. where paid labor spies and other gutter filth was used in an attempt to frame me and help destroy our union" (R. 129).

In the cases at bar, the Committee beyond question or doubt dealt with truculent, scornful and contumacious witnesses. The attitude of these witnesses can best be described in terms of established definitions:

Contempt, Words and Phrases, Vol. 9, page 51

"Contempt means the act of contempting or despising. The feeling with which one regards that which is esteemed mean, vile or worthless; disdain; scorn."

United States v. Ault, 263 Federal 800, 810.

"Contempt consists of a clear and open, willful disregard for authority and dignity of the court in a manner contrary to statute."

In Re: Presentment by Grand Jury of Stetson, 45 F. Supp. 567, 557.

At no time did any witness suggest that any answer was withheld because of a question of pertinency. One witness, Brown, came closest when he stated in response to the question of why he refused to answer:

"No, I just don't think it is your business" (R. 150).

It is worth mention in this connection that although trial was had, appeal taken to an Appellate Court, four appearances had in the Supreme Court of Ohio and written applications for re-hearing made; at no time, in any fashion, has either counsel or appellants suggested that the refusals to answer were based upon the pertinency of any of the questions. The precise time that appellants first sought shelter under the theory of pertinency coincided with this court's decisions in **Watkins** and **Sweezy**, nearly five years after appellants' appearance before the commission and over three years after the trials for contempt.

Not only by statements do these appellants differ from both Watkins and Sweezy, but by demeanor and attitude they leave little doubt as to their disdain and scorn for the Commission. Witness Raley was asked two hundred and nine questions. He answered seventy-six and declined

to answer one hundred and thirty-three. Raley was accompanied by counsel and on thirteen separate and distinct occasions conferred with him prior to answering questions. (R. Pages 80, 83, 91, 92, 94, 99, 100, 101, 103, 108, 113, 122, 123).

Raley concluded his appearance by reading a prepared statement (R. 123-131) in which he states:

> "Knowing the purpose of this Ohio Commission and the people who staff it, I proudly join with other patriotic Americans and also *refuse to cooperate with it*". (R. 130) (emphasis added)

How could a witness more clearly indicate in advance that he would not answer questions, pertinent or not. Along with Barenblatt, (**Barenblatt v. U. S.**, 252 F. 2nd 129, No. 35, October term, 1958) Raley came "prepared to refuse to answer any question of moment."

> "The record of the hearing, at which Barenblatt appeared and during which the questions in controversy were asked is devoid of any objection, interposed on the ground of pertinency. Indeed every indication is that he came prepared to refuse to answer any questions of moment-pertinent or not. He appeared before the subcommittee accompanied by counsel and armed with an eleven page prepared written statement . . ." **Barenblatt, Supra**, Page 134

Counsel for Raley, one Sidney Berger, likewise represented witness Stern (R. 131). This witness was asked one hundred and five questions and refused to answer sixty. His attitude toward the Commission was clearly revealed in the second question asked of him:

> "Where do you reside, Mr. Stern?
> Answer: "I wish to claim my privilege under the Fifth Amendment of the United States Constitution and Section 1, Article 10 of the Ohio Constitution" (R. 132).

At no time did Mr. Stern or his counsel in any fashion question the pertinency of any question asked of him. His repeated answer was "I claim the privilege" or "the same answer." The chairman of the Commission was sufficiently concerned with Mr. Stern's confusing manner of declining to answer questions that he made a specific effort to state that Mr. Stern's use of the phrase "I claim the privilege" or "the same answer" would be understood by the Commission as claim of privilege under the Fifth Amendment of the United States Constitution and Article 1, Section 10 of the Ohio Constitution (R. 134).

Typical of Mr. Stern's responses to questions is the following:

> "The chair requests that you answer the questions put by counsel."
>
> THE WITNESS: *"I will answer your question.* I might add that Mr. Isaacs and the members of this committee are acting under—
>
> CHAIRMAN RENNER: "Before adding anything will you answer the question.
>
> THE WITNESS: *"I will answer the question*
>
> CHAIRMAN RENNER: "After you answer the question you may add something if you wish.
>
> THE WITNESS: *"I decline to answer under the Fifth Amendment.* I might add—
>
> CHAIRMAN RENNER: "You have not answered the question so we will not permit you to add anything. Counsel, will you ask the next question." (R. 144). (emphasis added)

Witness Brown was asked 108 questions, he declined to answer 81. Brown also took occasion at the outset to make clear his position. His language was more in keeping with a participant in a bar room brawl than as a witness called before a Commission of the General Assembly of the State of Ohio.

Mr. Brown was so determined not to cooperate with the Commission that he resisted vigorously any effort by

either counsel or the chairman to place his objections to questions in the record in a fashion wherein he could properly assert his privilege. His truculent attitude continued throughout his questioning. When asked his age, he replied, "You add it up, I told you I was born August 24, 1925, I couldn't be fifty" (R. 151).

As further evidence of his disdain the following excerpts from the record are pertinent:

CHAIRMAN RENNER: "Do you refuse to answer?

THE WITNESS: "The answer is the same.

CHAIRMAN RENNER: "Do you refuse to answer the question?

THE WITNESS: "I invoke the Fifth Amendment of the Constitution of the United States in regard to the question.

CHAIRMAN RENNER: "The Fifth Amendment to the Constitution.

THE WITNESS: "Just a moment, I understand it to mean that I don't have to give evidence that I understand will incriminate me. Since I am not trained legally as you are, *I will decide what is expedient for me to answer and what is not expedient and if you don't like it you can take grounds otherwise.* (emphasis added) (R. 152) . . .

"Now I am going to answer you the way I want to answer you, see. You have got that now? I will again say I invoke the privilege of the Fifth Amendment, I even wrote it down. *I will give it to you to read if you don't understand it otherwise.* (emphasis added)

MR. CORRIGAN: "Mr. Isaacs I noticed the witness has his notebook but he doesn't seem to have a pencil, could he be provided with one.

THE WITNESS: "I have a pencil when I want to use one, thank you. (R. 154)

The care that the commission took to protect this witnesses rights is a matter of record. On Page 158 there is a long dialogue between Mr. Renner and the witness wherein it is obvious that Mr. Renner was seeking to clarify the record and the witness refused to acknowledge that his own rights were being protected. This dialogue culminated in the following:

> CHAIRMAN RENNER: "I am sincerely trying to clarify for the record what you mean each time you say 'the answer is the same'.
>
> THE WITNESS: "Each time I use the words 'the answer is the same' you ask me again what I mean by it and I will explain it.
>
> CHAIRMAN RENNER: "You have told me what you mean by it. I want the record to show that each time that you have used it and each time you propose to use it in the future, it will have that same meaning, is that correct?
>
> THE WITNESS: "No that is not correct, I cannot presuppose what you are going to say and if I make a blank statement like that, you can hold me to that.
>
> MR ISAACS: "Mr. Chairman, I think you are wasting your time trying to save this witness from a contempt citation by reading the grounds.
>
> THE WITNESS: *"You have not had any mercy on me so far Buddy, so don't start now. I will make it plain just how I feel about you. Don't show me no mercy. I wouldn't show you none, believe me."* (emphasis added)

III. IMMUNITY

Basic to any consideration of the position of these appellants is the effect of the Ohio statute on Immunity. This Statute, **R. C. 101.44,** provides as follows:

> "Except a person who in writing requests permission to appear before a committee or sub-committee of the

General Assembly or of either house thereof or who *in writing waives the rights, privileges and immunities granted by this section,* the testimony of a witness examined before a committee or sub-committee shall not be used as evidence in a criminal proceeding against such witness nor shall a person be prosecuted or subjected to a penalty or forfeiture on account of a transaction, matter or thing concerning which he testifies or produces evidence. This section does not exempt a witness from the penalties for perjury." (emphasis added)

It should be noted at the outset that an argument vigorously advanced by appellants in the courts below, namely that the Un-American Activities Commission was not a committee of the General Assembly has apparently been abandoned. The decision of the Supreme Court of Ohio in this matter (164 Ohio State 529) disposed of this argument in such fashion that even appellants now seem to concede its validity.

The basic question that must concern this court is whether or not this immunity statute confers sufficient protection as to render inoperative appellant's claim of privilege. This court has held so consistently to an established rule on immunity that no person need be unaware of its existence. Two early determinations of this court on this subject in effect stated the rule in both obverse and converse. It is seen only in its full force by the contrast of the two decisions. In the case of **Counselman v. Hitchcock,** 142 U.S. 547 (1891), this court held upon consideration of a specific immunity statute that the such immunity statute did not give broad enough protection and therefore could not be equated with a claim of privilege by a witness. Shortly thereafter in the case of **Brown v. Walker,** 161 U.S. 591, (1896) in considering another immunity statute the court held that sufficient protection was

granted to the witness and that therefore there was not available to him the privilege of remaining silent. **Counselman** and **Brown** are not inconsistent, the reconciliation is quite simple. Where an immunity statute is broad enough to supplant the privilege, the privilege is no longer available; where it does not, the privilege is available.

To assume that this rule is but sixty years old is not completely correct. The roots of the doctrine extend to the English Common Law and the land mark case of **Queen v. Boyes,** 1 B&S 311, wherein this subject is considered at some length. The inherent danger of extending **Counselman** beyond its own circumscribed boundries is pointed out by Justice Brown in **Brown v. Walker, Supra** at Page 600 in the following words:

> "The danger of extending the principle announced in Counselman is that the privilege may be put forward for sentimental reason or for a purely fanciful protection of the witness against an imaginary danger and for the real purpose of securing immunity to some third person who is interested in concealing the facts to which he would testify. Every good citizen is bound to aid in the enforcement of the law and has no right to permit himself under the pretext of shielding his own good name to be made the tool of others who are desirous of seeking shelter behind his privilege."

Firmly established in **Brown** was the doctrine that even if the grant of immunity by a state court does not grant immunity from prosecution by the federal government, such failure is not a controlling factor.

The question of immunity has returned again and again to this court and consistently this doctrine has been applied. In **United States v. Murdock,** 284 U.S. 136 (1941) the court held:

> "This court has held that immunity against state prosecution is not essential to the validity of federal statutes declaring that a witness shall not be excused from giving evidence on the ground that it will incriminate him and also that the lack of state power to give witnesses protection against federal posecution does not defeat a state immunity statute. *The principle established is that full and complete immunity against prosecution by the government by the government compelling the witness to answer is equivalent to the protection furnished by the rule against compulsory self-incrimination,* citing in addition to **Counselman** and **Brown, Jack v. Kansas,** 199 U.S. 372, **Hale v. Henkel,** 201 U.S. 43." (emphasis added)

The rule stated in reverse is likewise applicable. This phase of the problem was determined by syllabus in **Feldman v. United States,** 322 U.S. 487 (1943):

> "The Fifth Amendment does not forbid the use in evidence against a defendant in a criminal case in a federal court of self incriminating testimony theretofore compelled under a state immunity statute and without participation by federal officers—in proceedings in a state court."

Justice Frankfurter speaking for the majority took occasion to comment on what had been termed "the great judgment" of Chief Justice Taney in **Ableman v. Booth,** 21 How. 506, 516, who said:

> "The powers of the federal government and of the state although both exist and are exercised within the same territorial limits are yet separate and distinct sovereignties acting separately and independently of each other within their respective spheres. And the sphere of action appropriated to the United States is as far beyond the reach of the judicial process issued by a state judge of a state court as if the line of division was traced by land marks and monuments visible to the eye."

Significant to the issue at hand is the following statement: **(Feldman, supra, 493)**

> "Whether testimony in a New York court should be compelled in exchange for immunity from prosecution under the penal law of New York is for New York to say. For what purposes the United States may deem the disclosure of testimony more important than the prosecution for federal crimes is for Congress to say . . . the immunity from prosecution like the privilege against testifying which it supplants, pertains to a prosecution within the same jurisdiction. Otherwise the criminal law of the United States would be at the hazard of carelessness or connivance in some petty civil litigation in any state court, quite beyond the reach even of the most alert watchfulness by law officers of the government."

As recently as June, 1958 this court has seen fit once again to consider the problem. In **Knapp v. Schweitzer**, 357 U.S. 371, 78 S. Ct. 1302, Justice Frankfurter speaking for the majority restated the principle of law established in **Brown** and **Counselman** and followed for sixty years without exception. On Page 380 of the opinion it is stated:

> "This court with all its shifting membership has repeatedly found occasion to say that whatever inconveniences and embarrassments may be involved they are the price we pay for our federalism, for having our people amenable to—as well as served and protected by both governments. If a person may through immunized self disclosure before a law enforcing agency of the state facilitate to some extent his amenability to federal process or *vice versa* this too is a price to be paid for our federalism. Against it must be put what would be a greater price, that of sterilizing the power of both governments by not recognizing the autonomy of each within its proper sphere.

Within the past sixty days this court has once again considered an immunity question. In the case of **Brown v.**

United States, — U.S. —, (79 S.Ct. 539), the conviction of a petitioner for contempt was affirmed because the applicable immunity statute granted full and complete protection. Justice Stewart in delivering the opinion of the court took occasion to review briefly past consideration of immunity statutes. In the opinion he stated (Page 543):

> "For more than one-half century it has been settled that this statute confers immunity from prosecution coextensive with the constitutional privilege against self-incrimination and that the witness may not therefore lawfully refuse to testify. **Brown v. Walker**, (1896) 161 U.S. 591 . . . Suffice it to repeat that **Brown v. Walker** has become 'part of our constitutional fabric' ".

In view of this consistent line of decisions it remains only to determine whether or not the specific immunity granted by Ohio in **R.C. 101.44** is an adequate substitute for the protective shield of the privilege against self incrimination. In such consideration it should be noted that this statute uses the same form of words construed both in **Brown** and in **Knapp**. Aside and apart from this, the Supreme Court of Ohio has considered this immunity statute and held that it granted sufficient immunity to protect the witnesses involved. **State v. Morgan et al.**, 164 O.S. 529 — on a similar immunity statute see **Mouser v. Public Utilities Commission of Ohio**, 124 O.S. 425. This specific pronouncement by the Supreme Court of Ohio is particularly persuasive in view of the opinion in **Feldman**. It is submitted that the question whether testimony in an Ohio forum should be compelled in exchange for immunity from prosecution under the penal laws for Ohio is for Ohio to say.

In the case at bar the state immunity statute has been drawn as fully and broadly as such statute can be drawn by a state legislature. The statute itself does not even require

any act of the witness to avail himself of its benefits. To the contrary, not only must the witness specifically divest himself of his immunity, *but he must do so in writing.*

It is difficult to subscribe to a proposition of law that would say that personal liberties or personal privileges of a witness are in jeopardy when, in lieu of a privilege against self incrimination, he is cloaked with an immunity from prosecution as broad and as extensive as is within the power of the sovereign state of Ohio to grant. The position of appellants' leads inevitably to the conclusion that the State of Ohio, in the first instance, is prevented from any inquiry of witnesses, not because it has failed to give all the immunity which it can legally give, but because it has failed to give immunity which it cannot legally give.

It should be observed in passing that two of the three appellants herein appeared at the hearing with counsel and with prepared statements. The record reveals that all of the appellants were fully aware of the legal right to decline to answer by reason of fear of self incrimination. Appellants now claim that they and their counsel were misled as to the existence of the immunity statute. Observe the following statement of counsel on the general subject of law: (R. 99)

> "Mr. Berger: Mr. Chairman, you will forgive the witness for taking his legal advice from me, rather than from the committee?
>
> The Witness: If I recall—
>
> Chairman Renner: You may advise your witness what his rights are under the Constitution.
>
> Mr. Berger: I certainly will.
>
> Chairman Renner: I was not aware that you had advised him not to give that answer.
>
> Mr. Berger: I had not. I didn't advise him to give any answer. *I pointed out that you were telling*

the witness what the law is, and with all due respect, that is my function. If he wants to know the law, I think it is I he should ask and not you." (emphasis added)

This court has held that a person is bound rightly to construe a statute . . . a mistaken view of the law is no defense, **Armour Packing Co. v. U. S.**, 209 US 56, 85 **Sinclair v. U. S.**, 279 U.S. 263, 299, **Sanitary Manufacturing Co. v. U. S.**, 226 US 20, 49. It would seem impossible for any layman, much less a lawyer, to misconstrue the Ohio Immunity Statute.

The appellants are now in the position of contending that they and counsel are sufficiently familiar with the law to know the protections of the privilege against self incrimination but not enough of the law to know the same protections afforded by the immunity statute.

There are, doubtless, innumerable immunity statutes the mind of man could devise which would not afford complete protection to a summoned witness. This, however, is not the question at bar. The question here is whether or not this statute under these circumstances afforded sufficient protection to these appellants. If this be answered in the affirmative, these witnesses were obliged to answer.

SUMMARY

The Ohio Un-American Activities Commission was created by the 99th General Assembly of the State of Ohio in a joint action by both houses of the legislature, (Laws of Ohio, Vol. 124, Page 795), under a grant of power in the State Constitution (Art. II, Sec. 8). It began its legal existence on June 18, 1951. It continued its legal existence following the adjournment *sine die* of the 99th General **State ex rel Herbert v. Ferguson**, 142 Ohio State 496, **State of Ohio vs. Morgan, et al., supra.**

While the argument of continuing existence after adjournment was urged by the appellants below, the absence of it from their brief indicates that the point is no longer at issue.

The indictments herein are based upon the statute defining the powers of the chairman as to witnesses. It provides in effect that upon a refusal of a witness to testify to any matters regarding which he may be lawfully interrogated, the chairman may cause a proceeding for contempt to be filed. **(Revised Code 103.35)** In the case of these appellants, the Commission acting by and through a majority of its members adopted resolutions authorizing the chairman in the case of each defendant to institute contempt proceedings. These documents were offered in evidence at the trial of these appellants and became Exhibits Nos. 3, 4, and 5.

It has been the law of the State of Ohio for more than one hundred and fifty years that all crimes in the state are statutory in nature and origin. The general proposition is stated in **Lougee v. State,** 11 O. 68, as follows:

> "The legislature have the power to declare what acts are criminal and they have the same power to prescribe the forms of indictment for the commission of such criminal acts."

This has never been questioned. In addition the legislature has the power to prescribe suitable penalties in case of concern and to provide its own definitions and procedure (**State v. Lingelfelter,** 77 U.S. 523, **Stockton v. State,** 106 O.S. 249.

Pursuant to these well established principles, the General Assembly of Ohio has chosen to define and provide a punishment for this offense.

The series of statutes commencing with **R. C. 2705.02** which covers the elements of and the method of punish-

ment for contempt are readily divisible into the statute 2705.02 which defines the offense itself and the subsequent statutes which provide for the manner of punishment. What the legislature has done by the use of **R.C. 103.35** is to create a new offense, (that of the failure of a witness to respond to the lawful interrogation of a legislative commission) and then provide for the punishment of such offense by reference to the procedure required by the general statutes covering contempt, to wit: **R. C. 2705.03 et seq.**

It will be noted that the Legislature scrupulously avoided any conceivable invasion of judicial perogative in the determination of what is and what is not a crime in the trial of such matters by providing that any matters believed to be contemptuous by the commission itself should be referred without specification to the usual statutory prosecuting officer of the county in which the contempt conceivably occurred, for prosecution in a manner previously determined and referred to by long established law. The statutes in question make it abundantly clear that the conviction for contempt can occur only after proceedings by way of charge and trial have been had in the manner provided by law for criminal offenses generally.

The statute very clearly makes the trial and conviction for the commission of contempt, a matter solely for the concern of the regular, appropriate Courts upon charges in writing filed with the Clerk of Courts. In the cases herein, the charges arise from indictment by a Grand Jury which adds to rather than detracts from the degree of Due Process of Law which the appellants have received and indicates that in these cases the State of Ohio has extended precisely the same kind of "due process" provided by Ohio law to any and all alleged criminals.

Neither **R. C. 103.35** nor **R. C. 2705.02** to which it refers makes it an element of crime that the witness shall be ordered to answer or that he shall be warned that if he

does not he may be subjected to charges. This is not one of the elements which the Legislature has chosen to provide as an act or omission necessary to constitute the offense. The offense clearly becomes complete upon the refusal of a witness to answer a question pertaining to a matter about which he may be lawfully interrogated. It is quite possible that the Legislature could have made an offense of the disobedience of a witness of a lawful order of the commission. That, however, was not the basis of the charges made nor is such an offense provided for and defined in the statutes under which these indictments were returned. The *corpus* of the offense was the refusal to answer to lawful interrogation and the record is clear beyond question that the matter about which these defendants were questioned constituted lawful interrogation and that they did refuse to answer.

The record here shows that due process by every conceivable standard was accorded these appellants. The refusals were properly referred to the Prosecuting Attorney in the county where the offense occurred in the manner enjoined upon the commission by the statute by which it was empowered to function. The appellants were then served with written charges filed with the Clerk of the proper Common Pleas Court in the form of an indictment. They were thereupon brought into Court, given the opportunity to post bond and were assigned a date for trial. Despite the fact that Ohio law does not provide for the appointment of counsel for persons accused of misdemeanors, the Common Pleas Court of Hamilton County, Ohio did appoint counsel for these appellants which counsel included two former judges of the Court of Common Pleas and two former presidents of the Cincinnati Bar Association. The law on contempt is not clear whether or not the accused is entitled to a jury trial. In order that the rights of these

appellants be protected, the question was resolved by giving them an opportunity to have a jury trial. Appellants, however, in writing waived a trial by jury,.(R. 166-68-69) and consented to be tried by the Presiding Judge of the Court of Common Pleas sitting in the capacity both of judge and jury. After preliminary attacks upon the form and sufficiency of the indictments were overruled, the appellants proceeded to trial on a plea of not guilty and interposed as a defense to the allegations of the indictment, the claim that the questions to which answers were refused would tend to incriminate. Thereupon the Court reached a judgment determining that the defense interposed was neither proper nor sufficient and that the offense alleged had been proved.

With this as a background, it is difficult to see wherein these appellants have been deprived in any degree whatsoever of the due process of law to which they were entitled. It is submitted to the contrary that they have been given the benefit of every reasonable doubt, the benefit of every legal proceeding, and the benefit of overwhelmingly meticulous compliance with every requirement of constitutional provision and statutory law leading to their trial and conviction upon the charges presented by the indictment.

Appellee has taken occasion to point out that the majority decision in the recent case of **Brown v. United States, Supra,** strengthened the position of the State of Ohio on immunity. It should be observed here that the dissenting opinion in which the balance of the Court joined strengthened appellee's position that due process has been accorded. In **Brown** the dissent commented unfavorably upon the summary manner in which the petitioner had been sentenced for contempt. It is submitted to the court that it is precisely the vice of shortcuts in criminal procedure

(frowned upon by the dissent,) which have been carefully and scrupulously avoided in the cases at bar. The viewpoint urged by Justice Frankfurter, in **Sacher v. U. S.**, 343 U.S. 1, cited by the dissent at Page — is in accord with the fact situation herein. There has been no shortcut; there has been no summary proceeding; there was instead the procedural regularity deemed essential by Justice Brandeis and Justice Holmes in **Burdou v. McDowell**, 256 U.S. 465, 477 and adopted by this court in **Offutt v. United States**, 348 U.S. 11.

Appellants object in regard to one count that one witness was asked whether he supported any one candidate or issue in a preceding election. (Appellants Brief, page 14) He professes to present this count in the indictment as asking how he voted, why he voted, or whether he voted, invading both the secrecy of the ballot and his right of free speech and expression. It is submitted to the court that neither the government nor our law has reached the sorry condition of violating a citizen's right of free speech by asking a citizen whether or not he chose to exercise the right which was undeniably his. This collateral proposition now brought to the attention of the court demonstrates more effectively and more conclusively than any argument of counsel or any determinations of courts of law, the utter, almost absurd distortion and debasement of a witness's unalienable rights on the one hand and his basic responsibilities on the other.

CONCLUSION

The cases at bar present this court with the example of witnesses before a legislative commission who took every opportunity to indicate utmost contempt for the assembled committee. This court had previously returned these cases to the Supreme Court of Ohio for reconsideration in the

light of two cases where witnesses had carefully and in a reasoned fashion questioned the pertinency of their interrogation. The attempted extension of Watkins and Sweezy to Raley, Stern and Brown presents the precise type of danger that Justice Frankfurter in **Knapp v. Schweitzer, Supra,** mentioned at Page 374. Justice Frankfurter referred to:

> "the momentum of ajuducation whereby a doctrine expands from case to case."

If witnesses who initially decline to answer because of fear of self-incrimination, can five years after the fact successfully thwart the endeavors of a duly constituted legislative commission because an *ex post facto* ground of refusal is suggested then no legislature can ever compel testimony from any reluctant witness under any circumstances. If a legislative commission is to be impaled upon both the prong of a refusal to answer on fear of self-incrimination on the one hand and of pertinency on the other, the area within which such legislative commission can operate would become so circumscribed that its obligation to "Study, investigate and analyze" would become a meaningless one and the value of any legislative investigation destroyed.

It is, accordingly, submitted to the court that these appeals are not well taken under the applicable federal provision. It is further submitted that the defendants were accorded not only complete procedural due process under the law of Ohio, but a surfeit of it if such thing be possible. Even if it should be considered that by some stretch of the imagination or by some tortous reasoning or unforeseeable further development, any of which could justify these defendants in refusing answers to the questions asked on the grounds of self-incrimination; nevertheless, their privileges and safety in this respect would be completely

protected to the extent of the state's power by the immunity statute.

It is further submitted that the questions being pertinent to a legitimate field of inquiry by a duly constituted and instructed legislative commission some inquiry into matters regarded as within the exclusive realm of the First Amendment of the Federal Constitution might be permitted without doing violence to the basic rights of these defendants, but it is also suggested and urged upon this court that the questions for which these refusals were had and indictments returned could not and should not be deemed or interpreted as being of such nature or effect as to infringe the basic freedoms of these defendants.

The court is, accordingly, urged to dismiss the appeals of these defendants, or, in the alternative, upon any consideration of their merits, affirm the previous judgments.